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April 5, 2005

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

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Re: Finance Docket No. 34540, The Columbus & Ohio River
Rail Road Company – Acquisition and Operation Exemption
– Rail Lines of CSX Transportation, Inc. from Columbus to
Newark, Ohio and from Mt. Vernon to Cambridge, Ohio

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten
copies of the Reply of The Columbus & Ohio River Rail Road Company to UTU's
Supplemental Petition to Revoke.

An additional copy of the Reply also is enclosed. Kindly indicate receipt of
the filing by time-stamping this extra copy and returning it to the bearer of this letter.
Thank you for your consideration in this matter.

Sincerely,



Andrew B. Kolesar III
An Attorney for The Columbus & Ohio
River Rail Road Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

APR 5 2005

THE COLUMBUS & OHIO RIVER RAIL)
ROAD COMPANY – ACQUISITION AND)
OPERATION EXEMPTION – RAIL LINES)
OF CSX TRANSPORTATION, INC. FROM)
COLUMBUS TO NEWARK, OHIO)
AND FROM MT. VERNON TO)
CAMBRIDGE, OHIO)

Finance Docket No. 34540

REPLY TO UTU'S SUPPLEMENTAL
PETITION TO REVOKE

THE COLUMBUS & OHIO RIVER
RAIL ROAD COMPANY
47849 Papermill Road
Coshocton, Ohio 43812

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Dated: April 5, 2005

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

APR 5 2005
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| ROAD COMPANY – ACQUISITION AND |) | |
| OPERATION EXEMPTION – RAIL LINES |) | |
| OF CSX TRANSPORTATION, INC. FROM |) | Finance Docket No. 34540 |
| COLUMBUS TO NEWARK, OHIO |) | |
| AND FROM MT. VERNON TO |) | |
| CAMBRIDGE, OHIO |) | |

**REPLY TO UTU’S SUPPLEMENTAL
PETITION TO REVOKE**

On March 21, 2005, the United Transportation Union (“UTU”) filed a Supplemental Petition to Revoke the Exemption (“Petition”) noticed by The Columbus & Ohio River Rail Road Company (“CUOH”) in this proceeding. In its Petition, UTU argues that the subject transaction was a “sham” designed to evade CSX Transportation Inc.’s (“CSXT”) labor agreements, and that CUOH was not a “logical entity” to be considered as the operator.

UTU’s arguments are without merit under the Board’s governing precedent. CUOH is completely independent of CSXT, and CUOH entered into this transaction for legitimate business purposes. Moreover, since CUOH has operated over the C&N Subdivision for more than thirteen years, and since the subject Line is situated in the precise area served by CUOH and its fellow Summit View, Inc. subsidiaries, UTU’s argument disputing the “logic” of CUOH’s involvement is entirely misdirected.

BACKGROUND

A. CUOH's Notice and UTU's Efforts to Oppose the Exemption

On September 24, 2004, CUOH filed a verified Notice of Exemption under 49 C.F.R. § 1150.41 to acquire and operate, pursuant to an agreement with CSX Transportation, Inc. ("CSXT"), approximately 114 miles of rail line: (1) by purchase, between Columbus, OH, milepost BP 138.0, and Newark, OH, milepost BQ 0.0, totaling approximately 32.6 miles; and (2) by lease, between Mt. Vernon, OH, milepost BQ 25.9, and Cambridge, OH, milepost BP 49.49, via Newark, milepost BQ 0.0, totaling approximately 81.4 miles.¹ The transaction also included approximately 1.5 miles of incidental trackage rights assigned by CSXT to CUOH over a line of the Ohio Southern Railroad, Inc. ("OSR") between milepost 16.7 and milepost 18.2 in Zanesville, OH.² The Board served its Notice of this exemption of October 21, 2004.

On October 22, 2004, CUOH submitted a supplemental notice to the Board indicating that the parties had agreed to make minor modifications to their agreement

¹ In its August 27, 2004 pre-filing Notice to CSXT employees, CUOH indicated that "[a]s a result of these transactions, CUOH expects to hire approximately 6 operating employees (train & engine service) and approximately 3 other employees to perform maintenance of way and other functions." CUOH's Notice advised CSXT employees interest in seeking employment with CUOH to contact the "Director of Human Resources, CUOH Railroad, 27849 Papermill Road, Coshocton, Ohio 43812, telephone (740) 622-8092."

² CUOH and OSR each are subsidiaries of non-carrier holding company Summit View, Inc.

which had the net effect of increasing the number of miles of line at issue from approximately 114 miles to approximately 120.35 miles. Based upon these modifications, the transaction involved the acquisition: (1) by purchase, between Columbus, OH, milepost BP 137.0, and Newark, OH, milepost BP 100.6, and between milepost BBW 0.0 and milepost BBW 1.8 in Newark, OH, totaling approximately 38.2 miles; and (2) by lease, between Cambridge, OH, milepost BP 49.49 and Newark milepost BP 100.6, between Cambridge milepost BPB 0.0 and Byesville, OH, milepost 5.14, and between Newark milepost BQ 0.0 and Mt. Vernon, OH, milepost BQ 25.9, totally approximately 82.15 miles. The Board served Notice of this supplemental filing on December 20, 2004.

UTU sought to disrupt this transaction on a number of occasions. First, UTU filed its first Petition to Revoke regarding the CUOH transaction on September 15, 2004 in Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc. (Notice filed September 1, 2004) (“First Petition”). Although UTU filed this First Petition only in Finance Docket No. 34536, UTU nevertheless requested therein that the Board revoke CUOH’s exemption in the instant docket. On September 24, 2004, UTU filed an Amended Petition to Revoke in Finance Docket No. 34536 (“Amended Petition”), adding a request for discovery from the Indiana & Ohio Central Railroad (“IOCR”) to its prior Petition. Once again, UTU’s Amended Petition sought revocation of the exemptions in both Finance Docket No. 34536 and the instant docket.

On October 5, 2004, UTU filed a letter with the Board in the instant proceeding (i.e., Finance Docket No. 34540) indicating that on September 30, 2004, UTU had mailed copies of its First Petition to Revoke and its Amended Petition to Revoke to CUOH. Notwithstanding the procedural irregularities associated with the UTU filings, out of an abundance of caution, CUOH filed a reply to UTU's First Petition and its Amended Petition on October 19, 2004.³

UTU filed its Third Petition to Revoke on October 22, 2004. UTU's Third UTU Petition was the first to be filed in Finance Docket No. 34540, and included only the following brief argument in support of revocation:

The exemption claimed by the Notice of Exemption should be revoked for the following reasons, among others:

1. The transactions, in whole or in part, noticed for exemption do not fall within the noncarrier line acquisition class exemption promulgated by 49 C.F.R. § 1150.41, *et seq.*
2. Regulation of the transactions, in whole or in part, is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101.
3. The Notice contains false or misleading information about the transaction.

See Third Petition at 3.

³ CUOH's Reply also addressed arguments raised by the Brotherhood of Locomotive Engineers and Trainmen ("BLET") in a September 13, 2004 Protest that BLET filed in Finance Docket No. 34536. Like the UTU's Petition and Amended Petition, the BLET filing also sought revocation of the CUOH exemption.

On January 25, 2005, UTU filed a “Supplemental Petition to Revoke” the CUOH exemption. Therein, UTU explained that since CUOH filed its Supplemental Notice on October 22, 2004, UTU – some three months later – “felt compelled to file this supplemental petition to revoke out of an abundance of caution.” See January 25 Supplemental Petition to Revoke at 3. The UTU Supplemental Petition did not add any new arguments to the prior UTU petitions, but instead simply recounted the same arguments cited above. CUOH filed a reply in opposition to UTU’s January 25 Supplemental Petition on February 7, 2005.

B. The Board’s Decision to Institute a Proceeding and UTU’s March 21 Supplemental Petition to Revoke

By decision served February 22, 2005, the Board instituted a proceeding to consider BLET’s Protest and UTU’s Petition to Revoke, granted UTU’s motion to compel the production of documents, and established a schedule for the submission of a Supplement to UTU’s Petition to Revoke. In accordance with that schedule, UTU filed the subject Petition on March 21, 2005.

UTU’s Petition asserts that “the notice of exemption contains false and misleading information, and regulation of this transaction is necessary to carry out the rail transportation policy.” See Petition at 2. After recounting the procedural history of the case, the UTU Petition lists certain “supplemental” facts drawn from four of the agreements that CUOH produced to UTU in discovery. Id. at 4-7. These agreements

included CUOH and CSXT's: (1) Land and Track Lease Agreement; (2) Purchase and Sale Agreement; (3) Freight Operating Agreement; and (4) Interchange Agreement at Parsons Yard in Columbus, Ohio. The facts listed by UTU relate principally to CSXT's retention of authority with respect to the portions of the Line that it has leased to CUOH. Id. at 4-5. In addition, UTU refers to the parties' agreement regarding pricing on traffic that moves from or to local CSXT stations, and to CSXT's audit rights. Id. at 6. UTU also indicates that prior to the subject transactions:

. . . CSXT employees, some of whom are represented by UTU, provided service on the C&N Subdivision and a line of railroad of the Lake Erie and Central Ohio Subdivisions without the use of a third party carrier like CUOH. This work was all done subject to a UTU/CSXT collective-bargaining agreement. This work will now all be done by CUOH.

Id. at 7.

UTU's argument regarding the merits of the Notice of Exemption identifies the Board's exemption authority under 49 U.S.C. § 10505(d), and notes that the Board retains the right to review transactions to protect the integrity of its processes. See Petition at 7 (citing Minnesota Comm. Ry., Inc. – Trackage Exempt. – BN R.R. Co., 8 I.C.C.2d 31 (1991)). UTU also acknowledges that under the Board's standards, it must articulate reasonable specific concerns.

In seeking to apply the Board's precedent to the facts of this case, UTU claims that this case "involves several unusual features which can only lead one to conclude the transaction is a device created merely to move a number of jobs out from

under a collective-bargaining agreement (CSXT) onto a nonunion carrier (CUOH).” Petition at 8. UTU adds that “[t]he circumstances surrounding the transaction indicate that the transaction was not motivated by a desire of the parties to realize legitimate business goals” and that “CUOH was not a logical entity to be considered as the operator.” Id. (alleging that the transaction is comparable to the transaction in Finance Docket No. 32523, Sagamore National Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corp. (ICC served Oct. 28, 1994) (“Sagamore”)).

UTU’s explanation of the “unusual features” and “circumstances” of the transaction is limited to the observation that CUOH’s car supply “will come almost entirely from CSXT” and that CSXT has maintained “significant” control over the operation of the subject track and “substantial” control over the property in question. See Petition at 8.

ARGUMENT

1. Legal Standard

Under the Board’s precedent, a party seeking to revoke an exemption “must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria” of 49 U.S.C. § 10505(d). See, e.g., Finance Docket No. 32766, Portland & Western R.R. – Lease and Operation Exemption – Lines of Burlington Northern R.R. (STB served October 15, 1997); Finance Docket No. 33315, Minnesota Northern R.R. – Exemption – Acquisition and Operation of Rail Line and Incidental

Trackage Rights from Burlington Northern R.R. (STB served August 14, 1997). As discussed in greater detail infra, UTU has failed to meet this strict standard.

2. UTU's Failure of Proof

The most significant defect of UTU's Petition is its lack of a coherent explanation of the manner in which the facts identified by UTU support the sweeping conclusions that UTU reaches. For example, UTU claims that the Notice of Exemption contains "false and misleading information," but UTU does not identify the information from the Notice that it claims to be false and misleading. See Petition at 2. Similarly, UTU argues that regulation of the transaction is necessary to carry out the rail transportation policy, but UTU does not identify which aspects of that policy are implicated by the transaction. Id. Other examples of this deficiency exist in the Petition:

- UTU asserts that this case involves "several unusual features" which can only lead one to conclude the transaction is a device created merely to move a number of jobs out from under a collective bargaining agreement, but UTU never identifies those supposedly "unusual" features (id. at 8);
- UTU states that the "[t]he circumstances surrounding the transaction indicate that the transaction was not motivated by a desire of the parties to realize legitimate business goals," but UTU neither identifies those circumstances nor offers any explanation of what business goals would be regarded as "legitimate" (id.);

- UTU insists that CUOH was not a “logical entity” to be considered as the operator, but UTU neither explains this supposed absence of “logic” nor offers any what criteria are necessary to establish “logic.” Id.

3. The Sagamore Case Does not Support UTU’s Argument

In addition to lacking coherent explanations for the conclusions that it reaches, UTU’s Petition also is legally inadequate. To that end, UTU’s argument places its greatest emphasis upon the ICC’s holding in the Sagamore case, and UTU alleges that there are many facts of the instant transaction that are similar to those of Sagamore. See Petition at 8. UTU’s reliance on this case is unavailing, however, because the salient facts of the Sagamore proceeding simply are not present in the instant case.

In Sagamore, the ICC found that an exemption noticed by a purportedly new carrier under 49 C.F.R. § 1150.31 actually was a sham through which the real party in interest (i.e., Indiana Hi-Rail) sought to avoid its labor obligations. See Finance Docket No. 32523, Sagamore National Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corp. (ICC served August 26, 1994) (“In cases in which a transaction is alleged to be a sham, we look for indicia that the new company is independent of any rail corporate parents or siblings and require that the new company demonstrate its independence from the seller.” “An attempt by a carrier to reincarnate itself in a new corporation, possessed of its former rail assets and shorn of troublesome obligations such as collective bargaining agreements, would constitute the use of the

Commission's processes merely to allow railroads to escape their labor agreements.""). In support of its decision to revoke the Sagamore exemption, the ICC noted that the president of Indiana Hi-Rail was also the president of Sagamore National Corporation, and that the two carriers shared the same address. Id. ("Here, the notice has been challenged and Saganat has failed both initially and on appeal to demonstrate that the transaction is an arms length purchase by an independent party as contemplated by the class exemption."").

There are a critical differences between the facts of Sagamore and the facts of the instant case, which confirm that the Sagamore case does not support the revocation of the instant exemption. First, Sagamore involved a new carrier acquiring a rail line under 49 C.F.R. § 1150.31, rather than an existing carrier (like CUOH) extending its lines through a 49 U.S.C. § 10902 transaction under 49 C.F.R. § 1150.41. Since CUOH has a long history of operation, there can be no suggestion – as was the case in Sagamore – that CUOH was created for purposes of this transaction. See Finance Docket No. 32766, Portland & Western R.R. – Lease and Operation Exemption – Lines of Burlington Northern R.R. (STB served Oct. 15, 1997) ("Portland & Western") ("As an existing connecting short line, the PWR was a logical entity to be considered as a lessee. PWR was not created for this transaction, one of many facts that distinguish it from [Sagamore].").

Second, CUOH is completely independent of CSXT. There is no commonality between the parties' principals, and there is no common address shared by the two carriers. CUOH is, as noted above, a subsidiary of Summit View, Inc., and has no corporate ties to CSXT. Unlike the transaction in Sagamore, the instant transaction was conducted entirely at arms'-length.

CUOH entered into the subject transaction in order to expand the scope of its business in Central Ohio, where Summit View subsidiaries currently operate. Through the transaction, CUOH will gain additional business opportunities and will enhance the efficiency of its current rail system. UTU simply has not offered any explanation whatsoever of the reason that CUOH would willingly engage in a transaction that lacked legitimate business value.

* * *

Finally, it is worthwhile to comment upon UTU's allegations that CSXT has retained excessive control over the subject line. In CUOH's experience, there is nothing at all unusual or nefarious about a lessor retaining certain rights over a rail line that it has leased to a tenant carrier, and there is nothing unusual about the lessor in such a situation providing rail cars or setting rates for service to or from its local stations. See Portland & Western, supra (rejecting claims that certain lease provisions warranted revocation of an exemption). CUOH entered into this transaction for legitimate business

reasons and CUOH respectfully submits that UTU's allegation that CUOH is now a "virtual piece of the CSXT system" (see Petition at 8) is entirely unfounded.

CONCLUSION


For the foregoing reasons, CUOH respectfully requests that the Board deny UTU's Supplemental Petition to Revoke.

Respectfully submitted,

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Dated: April 5, 2005

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Certificate of Service

I hereby certify that this 5th day of April, 2005, I have caused a copy of the foregoing Reply to be served via first-class mail, postage prepaid, upon the following individuals:

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